Kentucky Law Journal

Volume 59 | Issue 3 Article 8

1971

# Juvenile Courts: Kentucky Law in Need of Revision

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# Note

## JUVENILE COURTS: KENTUCKY LAW IN NEED OF REVISION

> There is evidence, in fact, that there may be grounds for concern that the child receives the worst of both worlds: that he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children.[1]

There is a revolution in progress which bears upon juvenile courts. The decade of the sixties produced much criticism and some fundamental changes in the juvenile court system which had been placidly accepted for over sixty-five years. The task of the seventies will be to reformulate goals, re-examine prejudices, arouse community interest, and revamp institutions to deal more effectively with juvenile delinquency. It is the author's belief, after observing the day to day operations of juvenile courts, that an overview of the problem would be helpful to all concerned. This is especially true of lawyers who, until recently, had little exposure to the secretive juvenile justice system. It is not the author's intent to compare the juvenile courts of Kentucky to those of other states, nor to explore in any real depth the quality of post-dispositional treatment and rehabilitation. Rather an attempt will be made to examine the revolution as it most directly affects the structure and procedures of juvenile courts, with emphasis on the juvenile justice system in Kentucky. It is hoped that this analysis will be of special value to all those charged with the responsibility of overseeing the community interest in both the welfare of our children and the public order.

### The Problem

Juvenile courts are informal judicial tribunals separate and distinct from criminal courts. On the one hand they deal with conduct such as rape or robbery which would be a crime if committed by adults. On the other hand they adjudicate activities such as waywardness,[2] dependency,[3] and truancy,[4] which have no counterparts in

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[1] Kent v. United States, 383 U.S. 541 (1966) (Fortas, J.).

[2] Ky. Rev. Stat. [hereinafter cited as KRS] § 208.020 (1)(b) (1964) creates jurisdiction over a child under eighteen years of age who does not subject himself to the reasonable control of his parents, teacher, guardian or custodian; by reason of being habitually disobedient.

[3] KRS § 199.011 (1962) defines "neglected or dependent child" for purposes of juvenile court jurisdiction. The term means any child who is under such improper parental care and control or guardianship as to injure or endanger the morals, health, or welfare of himself or others. *See* KRS § 208.010 (5) (1962).

[4] KRS § 208.020 (1)(c) (1964) subjects to juvenile court jurisdiction any child under eighteen who is an habitual truant from home or from school.

adult criminal codes. A classification of delinquency for either the criminal or non-criminal type conduct can result in incarceration for the remaining period of minority. Though nominally the court decree of delinquency is not subject to the stigma of criminality, the public recognizes little difference. Until recently, juvenile tribunals were actually exempt from strict compliance with the due process guarantees of the fourteenth amendment. Whether the legal nature of these courts is civil, criminal or some combination remains uncertain.

Though differing in some respects, juvenile courts exist in all jurisdictions and their importance cannot be minimized. Nationally, one out of every nine children will be referred to juvenile court for an act of delinquency before his eighteenth birthday. Considering boys alone, the ratio rises to one out of every six.[5]

## I. THE EVOLUTION OF JUVENILE THEORY: WHERE DO WE GO AFTER GAULT?

The realization of separate courts to deal with youthful offenders is a relatively recent phenomenon. In England and America, until the twentieth century, a child under seven could not be convicted of a common law crime since he was supposed incapable of the necessary *mens rea* or criminal intent. Between the ages of seven and fourteen, courts entertained a presumption of incapacity, but the presumption could be overcome by a showing of sufficient intelligence to know the difference between right and wrong. Indeed, a reasonably mature child of eight might be convicted and executed for barn burning.[6]

The law, however, was not totally without humanity. Courts in England have long asserted jurisdiction, in equity, over children considered neglected and dependent. The king was *pater patriae* or the ultimate father of all children in the realm and it was this authority that furnished the basis of jurisdiction in the courts of chancery. Yet these courts dealt almost exclusively with the protection of children's property rights. They refused to interfere with the common law courts in the punishment of youthful criminals.[7] When colonial America inherited the English legal system, we extended the jurisdiction of the equity courts to protect the personal rights of accused children as well

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[5] CHILDREN'S BUREAU, U. S. DEPT. H. E. W., STAT. SER. No. 83, JUVENILE COURT STATISTICS 1 (1967).

[6] F. SUSSMAN & F. BAUM, LAW OF JUVENILE DELINQUENCY 2-3 (3d ed. 1968). *See* 4 BLACKSTONE, COMMENTARIES 23-24; H. WADDY, THE POLICE COURT AND ITS WORK 104-07 (1925).

[7] PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: JUVENILE DELINQUENCY AND YOUTH CRIME 2 (1967) [hereinafter cited as TASK FORCE REPORT].

as their property interests. Otherwise, English juvenile law was carried over intact.

### A. *Parens Patriae Theory*

In the middle of the nineteenth century, America was deep in the throes of a social reform movement. Rapid industrialization precipitated not only an increase in scientific knowledge, but a breakup of family ties and increased youthful deviance from traditional norms. Though industrialization produced much of the need for reform, it was the products of industrialization that provided the impetus behind the reform movement. Men imbued with the spirit of progress harbored a firm belief in an expanding body of knowledge in the social sciences, which they began to apply to the increasing problem of deviant behavior among juveniles. If the troubled child could be exposed to the proper treatment, then the environmental influences that produced his deviant behavior could be unscrambled and a proper cure effected.[8] Rehabilitation became the chief goal in the handling of juveniles.[9] In fact, many reformers so totally identified the interests of society with the goal of rehabilitation that the community interest in public security was eclipsed. It was simply inconceivable to these reformers that inherent limitations could exist in scientific knowledge or available community resources which would prevent many of these children from being helped.[10]

Early statutes were aimed at segregating juveniles from adults in prisons and jails. Later, the first reformatory for children was established in New York. Massachusetts, in 1880, pioneered the first probation system, as an alternative to confinement.[11] During the last thirty years of the century, separate hearings were organized for child offenders in Massachusetts, New York, Indiana, and Rhode Island.[12] The only major element remaining unaccomplished, the creation of a separate and distinct juvenile court system, came in 1899 with the enactment, by the Illinois legislature, of the first juvenile court statute in the world.[13] Under that law, the Juvenile Court of Cook County commenced operations in Chicago. Shortly thereafter, due to the promotional skill of Judge Ben Lindsay, Colorado followed with a juvenile court statute,[14] and by 1920 only three states had not provided

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[8] Paulsen, *The Child, The Court & The Commission*, 18 JUV. CT. JUDGES J. 79 (1967).
[9] M. BASSIOUNI & T. SHIEL, YOUTH AND THE LAW 62, 64 (1967).
[10] F. ALLEN, THE BORDERLAND OF CRIMINAL JUSTICE 45 (1964).
[11] SUSSMAN & BAUM, *supra* note 6, at 3.
[12] *Id.*
[13] Act of April 21, 1899, ILL. LAWS § 21, at 137 (1899).
[14] COLO. REV. STAT. ch. 37 (9)(2) (1909).

such legislation. Today, all states and the District of Columbia have some version of a juvenile court.[15] The systems thus established were anything but a miniature version of the adult criminal courts. The underlying philosophy, reflecting the reformers' belief that scientific cures could be effected, is best communicated in a classic article by Judge Mack:

> The problem for determination by the judge is not, has this boy or girl committed a specific wrong, but what is he, how has he become what he is, and what had best be done in his interest and in the interest of the state to save him from a downward career. . . .
> . . . The judge on a bench, looking down upon the boy standing at the bar, can never evoke a proper sympathetic spirit. Seated at a desk, with the child at his side, where he can on occasion put his arm around his shoulder and draw the lad to him, the judge, while losing none of his judicial dignity, will gain immensely in the effectiveness of his work. . . .[16]

This informal tribunal was to be staffed with qualified judges and specialized medical and psychological personnel. The court was viewed as a gateway to the child's salvation. Lawyers and other trappings of the criminal courts were not necessary, because the proceedings were not adversary in nature. As inheritor of the old chancery courts, the juvenile courts asserted their jurisdiction as *parens patriae,* in the name of the state, instead of the king. The feeling prevailed that the solicitous care and treatment of a loving father need not be complicated by the due process rights of the child. As a civil court imbued with special rehabilitative powers, the due process clause of the fourteenth amendment did not apply. This argument, which fended off constitutional attack in forty separate jurisdictions,[17] is in sharp contrast to present day England where juvenile courts accord all the protection of criminal procedure to a child accused of delinquency.[18]

### *B. In re Gault*

In 1957 Dean Pound expressed his faith in the juvenile court system as one of the most significant advances in the administration of

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[15] For a state by state breakdown see SUSSMAN & BAUM, *supra* note 6, at 77-86.

[16] Mack, *The Juvenile Court,* 23 HARV. L. REV. 104, 120 (1909).

[17] *See, eg.,* Ex parte Januszewski, 196 F. 123 (C.C.S.D. Ohio 1911). For a complete collection see Paulsen, *Kent v. U.S.: The Constitutional Context of Juvenile Cases,* 1966 SUP. CT. REV. 167, 174 (1966); Note, *Misapplication of Parens Patriae Power in Delinquency Proceedings,* 29 IND. L. J. 475, 479-80 (1954).

[18] Henriques, *Children's Courts In England,* 37 J. CRIM. L.C. & P.S. 295 (1946).

justice since the Magna Charta.[19] If this conclusion is to survive in the light of reality, we will have to act quickly to prevent the courts' total demise. The number of crimes committed by juveniles is disproportionately high in relation to the number of juveniles in the population. According to the Federal Bureau of Investigation, the arrest of persons under 18 for serious crimes increased by 47 percent from 1960 to 1965. In 1965 persons under 18 referred to the juvenile courts constituted 24 percent of all persons charged with forcible rape, 34 percent of all persons charged with robbery, 52 percent of all persons charged with larceny, and 61 percent of all persons charged with auto theft.[20] Certainly the problem of juvenile delinquency has not been minimized by present court procedures. But let us not despair from statistics alone. At least we have been providing the humane and fatherly treatment that our conscience demands. Or have we?

In 1964 Arizona authorities arrested a 15-year-old boy for making indecent phone calls to a neighbor.[21] The boy, Gerald Gault, was detained until a hearing could be held; his parents were not notified of his arrest; he was never confronted with the complaining witness, nor did she ever appear in court. Without assistance of defense counsel, the youth was adjudicated delinquent and committed to reform school until he was 21 years old (six years, if not released sooner). The judge stated no reasons for his decision, and no transcript of the proceedings was prepared. If an adult had committed this same offense in Arizona, the maximum punishment would have been a fine of $50 or imprisonment in the county jail for no more than two months. Can less than fair treatment in court be justified on any theory of the quality of post-dispositional treatment? In view of the youth crime statistics, mentioned earlier, and the equivalent treatment accorded adults, the query is dubious on its face. A 1967 report by The President's Commission on Law Enforcement and Administration of Justice [hereinafter referred to as the President's Commission] made this comment on the problem:

> The dispositional alternatives available even to the better endowed juvenile courts fall far short of the richness and the relevance to individual needs envisioned by the court's founders. In most places, indeed, the only alternatives are release outright, probation, and institutionalization. Probation means minimal supervision at best. A large percentage of juvenile courts have no probation service at

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[19] GUIDES FOR JUVENILE COURT JUDGES 127 (1957).
[20] F.B.I. UNIFORM CRIME REPORTS 23 (1965).
[21] *In Re* Gault, 407 P.2d 760 (Ariz. 1965), *rev'd*, 387 U.S. 1 (1967).

all, and in those that do, caseloads typically are so high that counseling and supervision take the form of occasional phone calls and perfunctory visits instead of the careful, individualized service that was intended. Institutionalization too often means storage—isolation from the outside world—in an overcrowded, under staffed, high security institution with little education, little vocational training, little counseling or job placement or other guidance upon release. Programs are subordinated to everyday control and maintenance. Children spend weeks in limbo-like detention, awaiting bed space. Professor Glueck quotes a well informed penologist:

> There are things going on, methods of discipline being used in the State training schools of this country that would cause a warden of Alcatraz to lose his job if he used them on his prisoners. There are practices that are a daily occurence in some of our State training schools that are not permitted in the prisons or penitentiaries of the same States. There are many States in which this discipline is more humane, more reasonable, in the prison than it is in the State training school.[22]

Few venture to suggest that a overly optimistic theory is the sole cause for failings in the present juvenile court system. But it does seem valid to suggest that we have yet to accumulate a body of scientific knowledge sufficient to rehabilitate large numbers of troubled youth. If an unlimited quantity of money were channeled into the system, it is still likely that many delinquent children could not be helped. Nevertheless, the current level of discontent might well have been lessened by a sufficient community response in the allocation of resources to the juvenile justice system.[23]

If we conclude, as the Supreme Court did in *In Re Gault,* that the treatment goals remain largely unrealized,[24] then there can be little justification for denying the fundamental tenets of due process to youthful offenders. In theory there was a mutual compact between the courts and the alleged delinquent. Certain procedural rights were relinquished for fatherly treatment and reform. Whatever the reason, this fictional contract has been broken.[25] To a court observer, as to a child mustered through the process, the impression of a "kangaroo

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[22] TASK FORCE REPORT, *supra* note 7, at 8. The statement of Professor Glueck quoted therein may be found in Glueck, *Unfinished Business in the Management of Juvenile Delinquency,* 15 SYCRACUSE L. REV. 628, 630 (1964).

[23] M. BASSIOUNI & T. SHIEL, *supra* note 10, at 79-80.

[24] *See* Gault v. United States, 387 U.S. 1, 22 (1967) where the Court stated:

> Certainly these figures and the high crime rates among juveniles to which we have referred, could not lead us to conclude that the absence of Constitutional protections reduces crime, or that the juvenile system, functioning free of Constitutional inhibitions as it has largely done, is effective to reduce crimes or rehabilitate offenders.

[25] Ketchum, *The Unfulfilled Promise of the Juvenile Court,* 7 CRIME AND DELINQ. 97 (1961).

court" is quickly conveyed. Neither probation nor institutionalization alleviate the original impression.

### C. *Post Gault Confusion: A Theory in Transition*

Concerning the selection of due process guarantees applicable to juvenile court proceedings, *Gault* is somewhat ambiguous. As a result it has often been discussed, but not uniformly understood.[26] Since at this point, we are primarily concerned with the theoretical implications of *Gault*, the precise holding will be examined later. Speaking for the majority, Justice Fortas did not conclude that juvenile court theory was obsolete—only that certain due process guarantees could not be ignored. In fact few commentators today recommend a total return to criminal court procedure.[27] The resulting fusion of *parens patriae* and procedural due process is best described by Justice Douglas:

> The idea is not the development of a Juvenile Criminal Court. The idea is not to relegate social workers, analysts, psychiatrists and others to a lowly position. The idea is to have a healthy specialized clinic, as the original founders desired; but to have it surrounded by safeguards so that individualized justice is more often obtained.
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> The requirements of procedural due process are only a start. Beyond that is the staggering problem of community indifference.[28]

Beyond *Gault*, juvenile theory is in a period of transition. States should be groping for much more than accomodation of Supreme Court guidelines within their present system. The time is ripe for new approaches to the problems of juvenile delinquency. If states cannot rejuvenate *parens patriae* to deal with the problems of a complex society, then revolution will succumb to reaction and the juvenile will fall heir to the full criminal process. Some contemporary recommendations and novel solutions need to be discussed and evaluated, but first it is necessary to look at the current system which the juvenile offender faces in Kentucky.

## II. JUVENILE COURT LAW IN KENTUCKY

The juvenile court statute in Kentucky, KENTUCKY REVISED STATUTES [hereinafter referred to as KRS] Chapter 208, has been amended and

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[26] *Compare* V. NORDIN, GAULT: WHAT NOW FOR THE JUVENILE COURT? 15-18 (1968), *with* BASSIOUNI & SHIEL, *supra* note 10, at 76.

[27] One of the few recommendations for a return to total criminal procedure in juvenile court may be Parker, *Instant Maturation for Post-Gault "Hood"*, 4 FAM. L. Q. 113 (1970).

[28] Douglas, *Juvenile Courts and Due Process of Law*, 19 JUV. CT. JUDGES J. 9 (1968).

revised many times. At present it bears a strong resemblance to the 1959 edition of the Standard Juvenile Court Act. The Standard Act provided an alternative form for either a state administered system or one based on individual county or district units. In opting for the latter, the county courts of Kentucky acquired jurisdiction over any child under 18 living or apprehended within the county. Each county wherein the child is a resident, resides, or is found has concurrent jurisdiction. Subject matter jurisdiction of the juvenile (county) courts is as broad as anywhere in the nation. With minor exceptions any of the following can be a basis of jurisdiction: 1) being wayward or habitually disobedient; 2) being an habitual truant; 3) being found neglected, dependent, needy or abandoned; 4) having committed a public offense.[29]

The institution of proceedings in juvenile court is by petition, not complaint. The statute clearly specifies that the petition is to be styled "in the interest of" the child and not in the nature of a criminal complaint.[30] The placing of a child in custody is not termed an arrest. Unless the nature of the alleged offense indicates to the contrary, an officer taking custody is directed to release the youth to his parents pending a hearing, the only condition being a written promise by the parents to deliver the child at the specified trial date.[31] Bail is not available. Before disposition the court is directed to conduct an investigation of the child, which is to include anything that may pertain to "his life and character." The written report thus obtained becomes a part of the proceedings.[32] The adjudicatory hearing itself is to be informal, with the public to be excluded, although the judge has some discretion in this area. No trial by jury is allowed.[33]

If the youth is alleged to have committed a felony while over 16 years of age, or under 16 if the charge is murder, rape or accessory to murder or rape, the juvenile court can waive jurisdiction. If the juvenile court does waive jurisdiction, the child would be tried in the regular criminal courts.[34] If convicted of a felony by the circuit court, he could be sentenced to prison or committed to the Kentucky Department of Child Welfare [hereinafter referred to as the Department][35] If the juvenile court retains jurisdiction, the dispositional alternatives available other than outright release include: 1) probation;

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[29] KRS § 208.020 (1964) defines both the in personam and subject matter jurisdiction of juvenile courts in Kentucky.
[30] KRS § 208.070 (1), (2) (1952).
[31] KRS § 208.110 (3) (1952).
[32] KRS § 208.140 (1) (1956).
[33] KRS § 208.060 (1952).
[34] KRS § 208.170 (1) (1962).
[35] KRS § 208.180 (1) (1962); KRS § 208.170(2)(b) (1962).

2) commitment to the custody of a public or private institution approved by the Department; 3) commitment to the Department.[36] Any adjudication by the juvenile court, as opposed to a decree in circuit court, is not to be deemed a conviction, nor is a child who has been declared delinquent to be deemed a criminal for any purpose.[37]

Few direct references are made to the application of procedural due process, but neither is the proceeding categorized as civil in nature. In review, it becomes quite apparent that KRS Chapter 208 falls well within the guidelines of *parens patriae* theory.

## III. OPERATION WITHIN THE STATUTE

Statistically, Kentucky enjoys about the same lack of success in solving the problems of juvenile delinquency as the national average would indicate. Beyond the national averages, it has been estimated that 90 percent of Kentucky youth have committed an act or acts for which they could have been referred to juvenile court. One out of every seven males *will* be referred before his eighteenth birthday.[38] In 1968 alone, 14,088 children were referred to juvenile courts in Kentucky. This figure represents 10,583 different people. Over 40 percent were charged with acts which would not be a crime if committed by adults—truancy alone representing 8.2 of the 40 percent.[39] As for acts which would be criminal if committed by adults, juveniles were involved in 40 percent of all arrests for index crimes in Kentucky during 1968.[40] In the city of Lexington, 1969 official statistics show that while 206 people were arrested for auto theft, 117 were under 18; of 15 people arrested for forcible rape, 6 were under 18; and among 246 arrested for burglary, 118 were juveniles.[41]

As elsewhere in the nation, it appears that high rates of juvenile court referrals are not simply indicative of the rise in juvenile population. Rather they point to the lack of success in rehabilitation. In a study entitled Delinquency in Kentucky, the Kentucky Commission on Law Enforcement and Crime Prevention [hereinafter referred

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[36] KRS § 208.200 (1) (a),(b),(c) (1962).

[37] KRS § 208.200 (5) (1962).

[38] KENTUCKY COMMISSION ON LAW ENFORCEMENT AND CRIME PREVENTION, COMPREHENSIVE CRIMINAL JUSTICE PLAN C-1-9 (1969) [hereinafter cited as 1969 KY. CRIME COMM.]

[39] 1969 KY. CRIME COMM. C-1-10.

[40] KENTUCKY COMMISSION ON LAW ENFORCEMENT AND CRIME PREVENTION, COMPREHENSIVE CRIMINAL JUSTICE PLAN 223 (1970) [hereinafter cited as 1970 KY. CRIME COMM.].

[41] Statistics compiled by the City of Lexington, Ky. may be found in LEXINGTON - FAYETTE COUNTY REGIONAL CRIME COUNCIL, LEXINGTON - FAYETTE COUNTY CRIMINAL JUSTICE PLAN 35-37 (June 1970). A copy has been filed with the University of Kentucky Law Library.

to as the Kentucky Crime Commission] has collected statistics which illustrate that 80 percent of all juveniles treated in our corrective institutions and returned to the community get into trouble again within three years.[42] Supervised placement (probation) is often not a viable alternative. Only six courts in Kentucky have their own probation officers. The Department is able to provide juvenile counselors for probation services in 48 other counties. The 35 juvenile counselors of the Department average 50 or more cases at any one time.[43] In 66 counties the possibility of probation exists only when volunteers can be recruited.[44]

In many instances, the court needs a dispositional alternative intermediary between probation, which returns the youth to his former environment, and commitment to an institution. A day treatment center or other half-way house that could serve this function is non-existent in most instances. Such small-group rehabilitation projects are considered among the most effective in the nation.[45] To best illustrate the use of presently available resources, the following statement of the Kentucky Crime Commission is most appropriate:

> Regretfully, public administration and legislators are much more inclined to put money into bricks and mortar than into programs. . . . It is a sad reality that an administration will probably get more credit for constructing a building that may not be necessary than for funding a program which is desperately needed.[46]

The pertinent inquiry that immediately arises about our juvenile court statute in Kentucky is very similar to that about other states operating under *parens patriae*. If the lack of procedural due process is not justified, as *Gault* certainly makes clear, how do we proceed? What procedures are we required to implement?

## IV. SPECIFIC CONSTITUTIONAL RIGHTS AND KRS CHAPTER 208

If there is one area of clarity in this morass of confusion we label the juvenile justice system, it most certainly is the realization that we can no longer escape reality by pretending to operate in a civil setting without need of procedural due process. As we must be aware, *Gault* is only the beginning of a sensitive response. It can be argued

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[42] The study, *Delinquency In Kentucky* is unpublished. *See, Kentucky Crime Commission Emphasizes Greater Community Focus On Delinquency,* 21 JUV. CT. JUDGES J. 11 (1970).

[43] 1970 KY. CRIME COMMISSION, *supra* note 40, at 123.

[44] 1969 KY. CRIME COMMISSION, *supra* note 38, at B-45.

[45] 1970 KY. CRIME COMM., *supra* note 40, at 224.

[46] *See* note 42 *supra.*

that much of the discussion below need not create a statutory problem in Kentucky. This is a negative argument, resting primarily on the assumption that KRS Chapter 208 does not prohibit the newly acquired juvenile rights. Courts might, as the logic of that argument indicates, read many of the applicable specifics of procedural due process into the existing statute and thereby retain flexibility for new extensions or qualifications. Such a piecemeal approach fails to consider the extent to which the entire juvenile process needs fundamental revamping. Only a comprehensive new code is likely to encompass all the necessary changes in an intelligible and efficient framework.[47]

As a strand running throughout the following analysis the reader should keep in mind that the power of courts could be utilized to prevent incarceration on the basis of inadequate treatment opportunities. In this manner the community may be aroused to provide the proper allocation of resources. Bear in mind also that curing defects in character is subject to the present and/or inherent limitations of scientific knowledge.

### *A. Statutory Vagueness*

Though the subject matter jurisdiction of our juvenile courts is broad,[48] we are not burdened with an omnibus clause designed to cover any undesired conduct remaining. Such language as "manifest danger of falling into habits of vice"[49] or "habitually associates with vicious or immoral persons"[50] is not uncommon in other states' statutes. Within such jurisdictions, a child might well be adjudicated delinquent and committed to an institution for associating with his prostitute mother or his monther's business associates.[51] While the language of KRS section 208.020 is less flowery, it presents the same problems on a smaller scale. What does it mean to be "wayward" or "habitually disobedient"? How many times is "habitually"? The *Gault* application of due process to court procedure should renew the importance of these questions. At criminal law, statutes are construed narrowly and it has been suggested that such jurisdictional definitions as Kentucky's

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[47] Minnesota has promulgated new court rules in place of statutory revision. *See* RULES OF PROCEDURE FOR JUVENILE COURT PROCEEDINGS IN THE MINNESOTA PROBATE—JUVENILE COURTS (1969), *as amended*, (Supp. Sept. 1969) [hereinafter cited as MJCR]. California, Michigan, New Jersey and New York have recently taken the approach of statutory revision.

[48] *See* note 29 *supra* and accompanying text.

[49] CONN. GEN. STAT. ANN. §§ 17-379 (1960). *See* Mattiello v. Conn., 225 A. 2d 507 (Conn. App. Div. 1966), *cert. denied*, 225 A. 2d 201 (Conn. 1966), *cert. denied*, 395 U.S. 209 (1969).

[50] TEX. REV. CIV. STAT. Art. 2338-1, § 3 (c) (1925).

[51] Note, *"Delinquent Child" A Legal Term Without Meaning*, 21 BAYLOR L. REV. 352 (1969).

would be unconstitutionally vague.[52] As early as 1926, the Supreme Court formulated standards of precision for penal laws that, if applied, would seemingly invalidate section 208.020:

> That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalities, is a well recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law. And a statute which either forbids or requires the doing of an act in *terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the essentials of due process of law.*[53]

In spite of a general trend to increase the types of conduct subject to criminal penalities, many authorities have recognized the necessity, on practical grounds, of narrowing the jurisdiction of juvenile courts.[54] In view of the fact that 90 percent of Kentucky youth have committed acts or pursue a course of conduct for which they could be prosecuted in juvenile court,[55] the stigma that presently attaches to "juvenile delinquency" becomes a valid reason for narrowing the jurisdiction conferred by KRS Chapter 208. It is unfortunate that people generally equate delinquency with criminality while the statute based on *parens patriae* purports to free the individual from the classification. As the public categorizes an individual it often stamps his character. The youth soon begins to think of himself in this manner. If his maturity or character is somewhat unstable he begins to organize his thoughts and actions as others categorize him. How can the juvenile court ever become the gateway to rehabilitation until the proceedings impress those subject to it as fair and equitable? A juvenile, subject to the court process, finds himself treated as a criminal, but at the same time denied the fundamental tenets of procedural due process that normally accompanies a criminal trial. Separate sessions of court for first offenders and multiple offenders would help relieve the stigma of delinquency, as would an adequate fusion of *parens patriae* with due process. But in the final analysis, it would be best to keep as many children as possible out of the court process—at least where society is not substantially endangered thereby.

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[52] Paulsen, *Fairness to the Juvenile Offender,* 41 MINN. L. REV. 547, 556 (1957).

[53] Connally v. General Constr. Co., 269 U.S. 385, 391 (1926) [emphasis added].

[54] *See, e.g.,* Van Tyne, *Project 74: Citizen Support for the Court,* 19 JUV. CT. JUDGES J. 31, 33 (1968); TASK FORCE REPORT, *supra* note 7, at 2, 97-98.

[55] *See* note 38 *supra* and accompanying text.

### *B. Waiver of Jurisdiction*

In 1961 police arrested a 16-year-old boy suspected of rape and robbery. After several hours of questioning, he admitted being involved. He had a prior record. Despite a sworn statement of a psychologist that Morris Kent had a chronic mental illness, the judge relinquished jurisdiction to the regular federal criminal courts. No hearing was held on the waiver and the judge made no findings of fact. Kent's lawyer was not allowed to examine the file collected and the waiver order was issued without consultation with either the boy's lawyer or his mother. After trial, Kent was committed to an institution for the criminally insane. In addition, he was sentenced to thirty to ninety years for housebreaking and robbery. Such waiver proceedings are not uncommon, existing in more than forty states. The procedure is totally consistent with the modern recognition that scientific knowledge has not reached the point where all children can be helped within the juvenile court system. Nevertheless waiver proceedings are objectionable where used arbitrarily and without recognition of due process of law. In Kent's case the arbitrariness was blatant. On review by the Supreme Court, it was decided that a juvenile is entitled to: 1) a hearing on the issue of waiver; 2) representation by counsel at such hearing; 3) consideration by his lawyer of all the social and probation records; 4) findings of fact by the judge on the issue of waiver.[56] Unfortunately this case arose in the District of Columbia and did not concern rights applicable to state waiver procedures via the fourteenth amendment. Since the later case of *Gault* dealt only with the adjudicatory stage of the juvenile process, many states remain uncertain about constitutionally required procedures as to waiver.

The waiver procedure provided in KRS section 208.170 is silent on any safeguards. The decision to transfer a case to the regular criminal courts is in the discretion of the judge. No standards are provided beyond the broad admonition to consider the "best interests of the child." Shortly after *Kent v. United States*, the Kentucky Court decided *Smith v. Commonwealth*.[57] Evidently considering *Kent* as persuasive authority, *Smith* absorbed that decision.[58] As most other appellate courts, Kentucky refused to apply *Kent* retroactively.[59]

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[56] Kent v. United States, 383 U.S. 541 (1966).
[57] 412 S.W.2d 256 (Ky. 1967).
[58] *1967-68 Court of Appeals Review*, 56 KY. L.J. 360, 363 (1967).
[59] *See generally* Johnson v. New Jersey, 384 U.S. 719 (1966). *See also* State v. Hance, 233 A.2d 326 (Md. 1967); Cradle v. Peyton, 156 S.E.2d 874 (Va. 1967).

Though the constitutional validity of section 208.170 is beyond debate due to *Kent* and *Smith* the Section has outstanding weaknesses that persist. Criteria are badly needed to guide the juvenile courts. Too often the court may decide against waiver merely because the parents can afford to send the child to a private school outside the community. Judges are well aware of the lack of personnel and the non-existence of certain facilities, and as a result, the waiver decision too often reflects the economic status of the parents. At the same time great community pressure is usually brought to bear on the court when a serious crime has been committed. Under such circumstances it is hard to deny waiver, regardless of prospects for rehabilitation, when the waiver decision rests in the judge's discretion. Statutory guidelines will not altogether alleviate this problem, but they can at least assure the consideration of objective criteria other than the seriousness of the offense or the economic status of the juvenile's parents.[60]

### *C. Right to Bail*

KRS section 208.110 specifically provides that bail is not applicable when a youth is detained for juvenile court, which is consistent with the remainder of the section. If the arresting officer is directed to release the child to his parents, unless the circumstances indicate a necessity to do otherwise, then theoretically there would be little need of bail. But this type of *parens patriae* rationale is in the disrepute, and Kentucky is presently one of only three states that include such a provision in their statute.[61] *Gault* did not consider this problem and the Supreme Court has yet to rule on the subject, but the right to bail did arise recently in *Fulwood v. Stone*,[62] under a statute much like Kentucky's. That court held the statute, in discouraging removal from the parents, to be an adequate substitute for bail. Apparently Kentucky would agree with the rationale. But when the question arose in *Smith v. McCravy*,[63] the Jefferson County Circuit Court found a constitutional right to bail, the decision coming only eleven days after *Gault*. It has not resulted in an amendment to section 208.110. From the standpoint of *Gault* the *McCravy* decision seems

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[60] A detailed listing of criteria applicable to a waiver of jurisdiction may be found in TEX. CIV. STAT. ANN. Art. 2338-1, § 6(b)-(j) (Supp. 1968).

[61] *See* Note, *The Right to Bail & the Pre-"Trial" Detention of Juveniles Accused of Crime*, 18 VAND. L. REV. 2096, 2096-2100 (1965).

[62] 394 F.2d 939 (D.C. Cir. 1967). For an analysis of the case see 2 CRIM. L. RPTR. 2196 (1967).

[63] No. 108809, Jefferson Co. (Ky.) Cir. Ct., May 26, 1967. The decision is noted in 1 JUV. CT. DIGEST 5 (Nov. 1967).

more in line with Supreme Court guidelines, and it may be only a matter of time until *Gault* is extended to cover this area.

### *D. Conduct of the Hearing*

The precise area of concern in *Gault* was the adjudicatory hearing. Technically its holding is limited to this stage of the juvenile process.

#### 1. *In Re Gault*: Notice of the Charges

The child and his parents or guardian must be given written notice of the charges against him, sufficiently in advance of trial to allow for the preparation of a defense. The notice must set forth the charges with particularity. Chapter 208 provides for notice of the hearing but not for a notice of the charges,[64] although such information is usually included in the petition, a copy of which is forwarded to the parents. But that is not to say that all courts in the state provide the requisite notice in all cases. The real conflict comes with the second portion of the notice requirement. It may be quite impossible to state waywardness, or other courses of conduct with particularity. While it would seem wise to include a better provision for notice in the statute, the future may see the jurisdiction of juvenile court limited to public offenses, or at least considerably narrowed. The latter would, of course, eliminate the "particularity" problem.[65]

#### 2. *In Re Gault*: Right to Counsel, Right to Remain Silent, Confrontation of Witnesses.

A fair reading of *Gault* would suggest that in any adjudicatory hearing where the freedom of the juvenile is involved, the court must inform him of his right to retained counsel or appointed counsel if he cannot afford one. The small paragraph on conduct of hearings in Chapter 208 is of little help.[66] It is not suggested in our statute that counsel may participate in informal juvenile court hearings, though such is now the case. Not until 1968 did the Court of Appeals recognize that juvenile court must appoint counsel in indigency cases.[67]

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[64] For notice of hearing requirements see KRS § 208.080 (1) (1953).

[65] Suggestions for narrowing juvenile court jurisdiction will be discussed in detail in Part V of the text.

[66] KRS § 208.060 (1953).

[67] Workman v. Commonwealth, 429 S.W.2d 374 (Ky. 1968), held that life imprisonment without benefit of parole is cruel and unusual punishment when applied to juveniles. It also recognized that if the hearing was held today appointment of counsel would be necessary, but the Court refused to apply *Gault* retroactively.

It seems likely that the right to counsel will not begin and cease with the hearing. At least this is implicit in *Gault*:

> The juvenile needs the assistance of counsel to cope with problems of law, to make skilled inquiry into the facts, to insist upon regularity of the proceedings, and to ascertain whether he has a defense and to prepare and submit it. The child *requires the guiding hand of counsel at every step of the proceedings against him.*[68]

Ordinarily arrest and interrogation are the points at which the juvenile process begins to focus on a particular person. Logically this is a step in the proceedings against the accused. It should follow that notice of the right to counsel begins at this point in accordance with the *Miranda* requirements.[69] Of necessity, the right to counsel, either at hearings or arrest, focuses attention on the manner in which the requirement can be effectively waived. Because of the age and impressionable character of youthful offenders, they are especially susceptible to persistent interrogation. Minority alone will probably not invalidate a waiver or subsequent confession.[70] As with adults, maturity and education will be factors, along with the court's view of the manner of interrogation which the police used.[71] Yet it has been held that both parent and child must consent to waiver during interrogation if any resulting evidence is to be admissible.[72] This is the position taken by recent statutes and court rules of procedure.[73] Difficult problems are raised, however, if the parent and child are adverse. It may be that in such instances the court should examine the waiver even more closely.

When dealing with the admissibility of confessions, the cases generally are referring to waiver of the right to remain silent as well as the right to counsel. As *Gault* pointed out, even where the juvenile is concerned, both rights go hand in hand. The time at which these Constitutional guarantees attach in Kentucky is pure conjecture,

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[68] *In Re* Gault, 387 U.S. 1, 36-37 (1967), *quoting* Powell v. Alabama, 287 U.S. 45, 69 (1932) [emphasis added].

[69] Miranda v. Arizona, 384 U.S. 436 (1966). For a discussion of the application of *Miranda* rights in juvenile court see *In Re* Creek, No. 4320, D.C. App., June 10, 1968; Note, *Application of Gault: Its Effect On Juvenile Delinquency Proceedings In Texas*, 20 BAYLOR L. REV. 113 (1967); Comment, *In Re Gault: Juvenile Notice, A Proposal For Reform*, 47 ORE. L. REV. 166 (1968).

[70] *See* Jones v. State, 166 S.E.2d 617 (Ga. 1969).

[71] *See* Smith v. Crouse, 413 F.2d 979 (10th Cir. 1969); Phillips v. Smith, 300 F. Supp. 130 (S.D. Ga. 1969); Commonwealth v. Tabb, 249 A.2d 546 (Pa. 1969); State v. Lewis, 468 P.2d 899 (Ore. 1970).

[72] Freeman v. Wilcox, 167 S.E.2d 163 (Ga. 1969).

[73] *See, e.g.*, MJCR Rule 1-5 (3)(b); OKLA. STAT. ANN. tit. 10, § 1109 (Supp. 1968-69).

though the implications of *Gault* logically point to the arrest. The entire question of waiver remains undetermined.

The participation of lawyers partially raises the veil of secrecy that normally surrounds juvenile court proceedings. As participation increases, serious inquiry must be made about the role lawyers are to play. Attorneys are accustomed to presenting every possible defense, which may involve supressing a confession or other evidence, which was illegally obtained. But if *parens patriae* is still to have any meaning, and if juvenile courts are not to be relegated entirely to the status of a junior criminal court, then counsel owes a distinct duty to the child believed in need of treatment. The attorney's role is only complicated by the realization that treatment is often under par. The new *Code of Professional Responsibility* provides little assistance, as it deals primarily with lawyers engaged in an adversary process.[74] The Court of Appeals or the General Assembly needs desperately to define the lawyers role more fully. It may be that the legal profession must face the unique challenge of acting both as advocate and as counselor. If so, we are ill equipped without a background in child psychology.[75]

Only brief mention need be made of the accused's sixth amendment right to confront the witness against him. In *Gault,* the complaining witness never testified or appeared in court. As a result the right of confrontation was an express holding of the Supreme Court. But Chapter 208 is not as clear, "The presence of the child in court may be waived by the court at any stage of the proceedings."[76] The ostensible purpose of such language may be to allow the proceeding to continue when the child becomes extremely disruptive, a situation not altogther unfamiliar in the last several years. If this interpretation be accepted the provision is undoubtedly valid under the recent Supreme Court decision in *State v. Allen.*[77] Under any other interpretation it is difficult to see how this language could withstand constitutional scrutiny.

### 3. Evidentiary Problems

Many questions remain unanswered by *Gault.* As the complete discrediting of the *parens patriae* theory was carefuly avoided, the states were left with the following admonition:

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[74] AMERICAN BAR ASS'N, CODE OF PROFESSIONAL RESPONSIBILITY Canon V (1969).

[75] For an excellent discussion of the lawyer's role in juvenile court see Haviland, *Daddy Will Take Care of You: The Dichotomy of The Juvenile Court,* 17 KAN. L. REV. 317 (1969); Shaler, *The Right To Counsel and The Role of Counsel In Juvenile Court Proceedings,* 43 IND. L. REV. 558 (1968).

[76] KRS § 208.060 (1953).

[77] 397 U.S. 337 (1970).

> We do not mean . . . to indicate that the hearing to be held must conform with all the requirements of a criminal trial or even of the usual administrative hearing; but we do hold that the hearing must measure up to the essentials of due proces and fair treatment.[78]

Chapter 208 does not inform us what reports the defense may obtain from the police, institutions, probation officers, or social workers. KRS section 208.330 provides for the confidentiality of various records but makes no mention of defense inspection—except "by leave of the county judge." If lawyers are to participate in the hearing, the Court of Appeals or the General Assembly must provide objective guidelines on juvenile discovery. At present the subpoena of witneses may be the only way, outside the whim of public officials, to obtain information essential to a competent defense. The admissibility of hearsay and irrelevant statements are examples of equally pressing evidentiary problems that beset this strange admixture of a civil and a criminal court. They are clearly illustrative of the need to fashion a body of rules to meet the special requirements of juvenile court.[79]

The standard of proof aspect, untouched by *Gault*, has recently received considerable attention. Chapter 208, like most juvenile court statutes, does not specify a measure of proof. Traditionally, it was assumed that in a civil court, established as *parens patriae*, a "preponderance of the evidence" would suffice.[80] Since *Gault*, increased dialogue and debate has resulted in a split among the authorities.[81] The Fourth Circuit held, in *United States v. Costazo*,[82] that the criminal standard of "beyond a reasonable doubt" was applicable if there was any possibility that the child would be deprived of his freedom. A similiar conclusion was reached by the Illinois court in 1968.[83] It was felt by the Illinois court that the "spirit" of *Gault* required consistency

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[78] 387 U.S. 1, 30-31 (1967), *quoting* Kent v. United States, 383 U.S. 541, 562 (1966).

[79] For a good analysis of a full body of evidentiary rules see *Minnesota Juvenile Court Rules Symposium—Standards of Proof and Admissibility in Juvenile Court Proceedings*, 54 MINN. L. REV. 362, 378 (1969).

[80] U.S. v. Borders, 154 F. Supp. 214 (N.D. Ala. 1957); *In Re* Yardley, 149 S.W.2d 162 (Iowa 1967); *In Re* McDonald, 153 A.2d 651 (D.C. Mun. Ct. App. 1959); *In Re* Barkus, 95 N.W. 674 (Neb. 1959); Bryant v. Brown, 118 So. 184 (Miss. 1928); People v. Lewis, 183 N.E. 353 (N.Y. 1932), *cert. denied*, 289 U.S. 709 (1933); State v. Thompson, 275 S.W.2d 463 (Tex. 1955). *But see, In Re* Rich, 86 N.Y.S.2d 308 (Dom. Rel. Ct. 1949); *In Re* Madik, 251 N.Y.S. 765 (App. Div. 1931); Jones v. Commonwealth, 38 S.E.2d 444 (Va. 1946).

[81] *See* Cohen, *The Standard of Proof In Juvenile Proceedings: Gault Beyond A Reasonable Doubt*, 68 MICH. L. REV. 567 (1970); Pedigo, *Standard of Proof In Juvenile Delinquency Adjudications: New York Takes the Narrow View*, 9 J. FAMILY L. 316 (1970).

[82] 395 F.2d 441 (4th Cir. 1968).

[83] *In Re* Urbasek, 232 N.E.2d 716 (Ill. 1968).

with the criminal standard. Contrary positions were taken by the District of Columbia Court of Appeals,[84] Texas,[85] and New York.[86] Only last year was the confusion eliminated. After declining to resolve the issue in two recent cases,[87] the Supreme Court handed down *In re Winship* in March, 1970.[88] Drawing heavily on *Gault*, the Supreme Court again compared juvenile court proceedings, where institutionalization is a possibility, to a felony prosecution. Proof beyond a reasonable doubt is now an essential of due process and fair treatment. It cannot be denied by a "civil" label of convenience.

### 4. Public Hearings

Chapter 208 provides for "informal" hearings and the exclusion of the public in the discretion of the court.[89] This is the very essence of *parents patriae* theory. To many its elimination could only indicate the total demise of traditional theory which the *Gault* court so carefully side-stepped. The sixth amendment guarantees a public trial—perhaps ironically for the protection of the defendant. This guarantee has been applied to the states via the fourteenth amendment.[90] As yet it has not been formally extended to the juvenile courts, however it may be that local juvenile courts in Kentucky are formulating policies implimenting the sixth amendment. In spite of Chapter 208 theory, the Fayette County Court (session for second offenders) recently opened its doors to reporters.[91] They moved into a public courtroom where the judge donned his black robe, and seated himself behind the bench "looking down upon the boy." Judge Mack would literally turn over in his grave were he aware of such routine in juvenile courts.[92] The Fayette County Judge also announced that the names of second offenders, and first offenders if the charges were rape or murder, would be released to newspapers. This breaks a long-standing tradition against publication in Fayette County. It is a trend of the times that many are coming to believe that justice is better served wih added formality. Regardless of whether formality induces respect for the law, it may indeed be necessary for a real implementation of procedural due process.

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[84] *In Re* Wylie, 231 A.2d 81 (D.C. 1967).
[85] State v. Santana, 444 S.W.2d 614 (Tex. 1968).
[86] *In Re* W. v. Family Court, 299 N.Y.S.2d 414 (N.Y.Ct.App. 1969).
[87] *In re* Whittington, 391 U.S. 341 (1968); DeBacker v. Brainard, 396 U.S. 28 (1969).
[88] 397 U.S. 358 (1970).
[89] KRS § 208.060 (1953).
[90] *In re* Oliver, 333 U.S. 257 (1948); People v. Jelke, 123 N.E.2d 769 (N.Y. 1954).
[91] Lexington Leader, Sept. 18, 1970, at 1, col. 2.
[92] *See* note 16 *supra* and accompanying test.

### *E. Trial by Jury*

KRS section 208.060 provides: "All cases involving children shall be dealt with by the juvenile court at separate hearings and *without a jury.*" [Emphasis added.] Even in criminal cases, the Supreme Court has never obligated the states to recognize the jury trial guarantees of the sixth and seventh amendments. It has long been considered that such a proceedure was not in the "essence" of a "scheme of ordered liberty" and therefore not fundamental to due process.[93] But speculation on the post-*Gault* trend has revived the issue, and a number of states have found provisions similiar to section 208.060 under attack. Recent court decisions have revealed a split on the issue.[94] In *Dryden v. Commonwealth*,[95] the Kentucky Court reiterated its traditional acceptance of *parens patriae*. The Court granted that the logic of newly applied constitutional rights would seem to impel a recognition of jury trial in juvenile court, but drawing on its own experience the Court felt, as did Justice Holmes, that logic is not the life of the law. The Court's experience indicated that:

> A jury trial, with all the clash and clamor of the adversary system that necessarily goes with it, would certainly invest a juvenile proceedings with the appearance of a criminal trial, and create in the mind and memory of the child the same effect as if it were. In our opinion there is more to be lost than gained. Certainly we cannot regard a jury as a better, fairer, more accurate fact-finder than a competent and conscientious circuit judge. There may be some judges who do not fit this description, but neither do all juries.[96]

Considering the required qualifications of juvenile judges in this state, the Court's experience may belittle the truth.[97] Yet accepting this rationale as consistent with KRS Chapter 208 and traditional *parens patriae* theory, it does not appear consistent with the polices of some local juvenile courts which have opened hearings to the public.

Undoubtedly the last word on trial by jury in juvenile court is yet to be expresed. The precise question was posed to the Supreme Court

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[93] Palko v. Connecticut, 302 U.S. 319, 324-29 (1937).

[94] Courts recognizing a Constitutional right to trial by jury are: Nieves v. United States, 280 F. Supp. 994 (S.D.N.Y. 1968); Peyton v. Nord, 437 P.2d 716 (N.M. 1968); *In re* Rindell, 2 CR. L. REP. 3121 (Providence, R.I. Fam. Ct. 1968). Courts not recognizing a right to trial by jury are: *In re* Johnson, 255 A.2d 419 (Md. 1969); *In re* State *ex rel.* J.W., 254 A.2d 334 (Union Co., N.J. Juv. & Dom. Rel. Ct. 1969); People v. K., 296 N.Y.S.2d 404 (Kings Co. Sup. Ct. 1968); *In re* Burres, 167 S.E.2d 454 (N.C. 1969); State v. Turner, 453 P.2d 910 (Ore. 1969).

[95] 435 S.W.2d 457 (Ky. 1968).

[96] *Id.* at 461.

[97] *See* note 32 *supra*, and accompanying text for a discussion of the qualifications for the office of county judge.

in *DeBacker v. Brainard*,[98] but the case was dismissed as inappropriate to decide the issue. In view of *Gault*, the outlook appears bleak for *Dryden*. The Supreme Court appears to be looking for an appropriate case to settle the issue. Probable jurisdiction has recently been noted in two Pennsylvania cases dealing with the denial of a trial by jury demand, and both cases have been consolidated for hearing.[99]

### *F. Transcript and Appellate Review*

When these issues were raised in *Gault*, the Supreme Court declined to pass on them. Like the issue of trial by jury, it has been widely supposed that the Constitution does not require the states to establish an appellate court system—it is not an essential of due process. Since *Gault* was argued under the due process clause of the fourteenth amendment, it would have been a singularly inappropriate vehicle to require an appellate system for juvenile courts. Perhaps the result would be quite different if the question were raised under the equal protection clause. When states provide such procedure for adults, it may be necessary to give equal opportunity to youthful citizens. In Kentucky, a record of the proceedings (usually a few notes by the court clerk) is required and an appeal is provided to the circuit court.[100] It is not possible for an appeal to lie in the Court of Appeals unless the circuit court has erronously refused jurisdiction.[101] Though the procedure is laudable it may yet be found wanting. There appears to be little reason for denying a full transcript free of charge and review by the Court of Appeals. If *Gault* is extended in this area by way of the equal protection clause, the existence of a different appellate procedure in adult courts would probably be a major factor influencing the decision. Further, it would not be surprising to find that a "record" is not sufficient for appellate review. A comparison of juvenile court procedure to that of a felony prosecution could necessitate a statement of the judges findings of fact, if not his conclusions of law.[102] Revision of Chapter 208 in these particulars would seem appropriate at this time.

This foregoing analysis of constitutional problems with Kentucky law was not intended to be exhaustive. Indeed, such an exposition of

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[98] 396 U.S. 28 (1969).

[99] *In re* Terry, 265 A.2d 350 (Pa. 1970) and *In re* McKeiver, 265 A.2d 350 (Pa. 1970), *prob. juris. noted*, 90 S.Ct. 2271 (1970), *noted in* 2 JUV. CT. DIGEST 6 (1970).

[100] KRS § 208.040 (1953).

[101] KRS § 208.380 (1963). *See* Brewer v. Commonwealth, 283 S.W.2d 702 (Ky. 1955).

[102] *Kent* made such a comparison and required the judge to specify findings of fact in a waiver hearing.

the juvenile court in transition would necessarily extend to book length. It is meant to deliniate specific problem areas that need immediate attention. There are other areas of Chapter 208 equally in need of revamping, though they are not so closely linked with recent extensions of due process. It is to these problems we now turn.

## V. NON-CONSTITUTIONAL PROBLEMS WITH KRS CHAPTER 208

### *A. Juvenile Court Judges: The County System*

> The juvenile session of the county court . . . shall have exclusive jurisdiction in proceedings concerning any child . . . .[103]

The county judge is a constitutional officer elected to a four-year term. His duties may well be more complex than any other state official. Presiding over regular misdemeanor courts, preliminary hearings for felonies, probate court, civil court in cases involving less than $500, and fiscal court, the administrative agency of the county, his duties as juvenile court judge often receive the least of his attentions. He *can* appoint trial commissioners to relieve him of much of the burden, but this has been accomplished in only nine counties containing first and second class cities. Until 1968 other counties could offer a trial commissioner only $50 *per annum*.[104] A major weakness in the county system has always been financial inability. In more populated areas where funds are available the workload is immense and continually expanding. Seldom does capacity keep up with the docket. On the other hand, it is highly impractical to operate juvenile courts in smaller counties due to an insufficient volume of work. These considerations have led the National Probation and Parol Association to recommend a system of state administered courts. With the financial picture and complexity of the office as a backdrop, it is understandable that qualified people might shun the opportunity to be county judge. The problem is considerably magnified, from the standpoint of finding qualified judges, by the absence of substantive qualifications on a judge's background. The sole requirement in Kentucky is having reached 24 years of age.[105] Not only is it possible to be lacking in a gackground of child psychology, but one need not be an attorney. In fact, only twelve of the 120 county judges in 1965 were members of the Kentucky bar.[106] It is interesting to compare Kentucky's requirements for county judge with the text book qualifications of a juvenile court judge *alone*:

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103 KRS § 208.020(1) (1964).
104 1969 KY. CRIME COMM., *supra* note 38, at B-42.
105 KY. CONST. § 100.
106 1969 KY. CRIME COMM., *supra* note 38, at A-9-b.

> It seems clear that to be effective, the juvenile court judge requires *not only thorough training in law but a sound grasp of what is known about human behavior, especially as this knowledge relates to child development and adolescence.* In addition, since an effective juvenile court system will provide many alternative dispositions, the *judge must be skilled and knowledgable in the uses of these resources.*
>
> All these requirements mean that the juvenile court judge has a more complex job to do than most judges in courts of original jurisdiction. It is a common feeling among a large number of juvenile court judges that when they begin handling juvenile court cases they are almost totally unprepared for the functions they must perform and the decisions they must make . . . .[107]

In 1965 the General Assembly authorized the Department of Child Welfare to sponsor annually a Kentucky Conference of Juvenile Court Judges.[108] Among the stated purposes of the Conference was the training of judges, but to date participation is entirely voluntary. Although efforts should be made to extend such a program, realistically there is little excuse for a non-lawyer exercising judicial authority or for a juvenile judge to be lacking a background in child psychology.

### *B. Detention*

Concerning ourselves primarily with statutory problems, there are two areas dealing with detention in Chapter 208 that are of particular concern. The 1968 General Assembly provided that in every county containing a city of the first or second class a permanent detention home for juveniles must be supported by the fiscal court of that county.[109] The purpose of such a facility is "detention of children held in custody pending disposition."[110] It is well known that children often receive their first real contact with hardened delinquents or adult criminals while awaiting trial. Experiences in jail may create impressions impossible to erase. That the prevention of such contact was the evident goal of the legislature is supported by a pre-existing statutory provision. KRS section 208.120 specifically provides that no child under 16 years of age shall be detained in jail, "except on the basis of a hearing for that purpose." The Kentucky Crime Commission has found that both the above described provisions of KRS Chapter 208 are almost universally ignored. Permanent detention homes have been established in only four counties. In the other 116 counties, jail

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[107] Wheeler & Cottrell, *Juvenile Delinquency: Its Prevention and Control,* in CASES AND MATERIALS RELATING TO JUVENILE COURTS 420, 425-26 (Ketcham & Paulsen ed. 1967) [emphasis added].

[108] KRS § 208.555 (1968).

[109] KRS § 208.130 (2) (1968).

[110] KRS § 208.130 (1) (1968).

is usually the only facility for detention, though some effort is usually made to segregate juveniles from adults.[111]

Even in the counties with permanent detention homes, the spirit of the statute may not be followed. Kincaid Home, in Fayette County, is without decent security provisions. When the child is considered a security risk, he is often placed in the county jail, an atrocious place even for adults. Juveniles are quartered on the third floor of this outmoded facility with their mattresses spread out across the floor. It is sad indeed that a leaky pup tent in the rain might be preferable. There is literally no excuse for not uniformly enforcing the mandate of the legislature in these circumstances.

Our second area of concern deals with another enactment of the 1968 General Assembly. It has been provided that any county may arrange with the Department for use of regional reception-diagnostic centers "for those cases pending before the juvenile court of its county."[112] The problem is that two years after the effective date of the statute no such facilities exist. Only two are presently beyond the planning stage. The proposed Northern Kentucky Reception-Diagnostic Center is scheduled to open in July, 1971. Its present stage of completion is that the site has been purchased. There is an estimated capacity of only fifty patients. Its counterpart in western Kentucky has not yet acquired a building site.[113] If completed, regional centers would be a major contribution to rehabilitation programs.

## CONCLUSION: ALTERNATIVE IMPROVEMENTS AND SUGGESTIONS

We have presently arrived at a point in our analysis that may be termed a convergence. Having begun by tracing the evolution of juvenile theory to the contemporary stage of confusion and transition, we diverged from theoretical discussion to consider the position of Kentucky law along that path of evolution. Kentucky, like most other states, is groping to accomodate *parens patriae* theory with procedural due process, and to increase the effectiveness of the juvenile justice system. This is the essence of the post-*Gault* stage of transition. These dual themes must now converge to more fully consider the future direction of needed revision in the system of juvenile justice.

The most comprehensive suggestions for improvement within *parens patriae* are put forward by the President's Commission. Briefly summarized they are: 1) a narrowing of juvenile court jurisdiction; 2)

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111 1969 KY. CRIME COMM., *supra* note 38, at B-43.
112 KRS § 208.130(6) (1968).
113 1970 KY. CRIME COMM., *supra* note 38, at 135-36.

a formalizing of pre-judicial settlements; 3) the creation of a "youth services bureau" to handle less serious referrals; 4) a division of juvenile court into an "adjudicatory hearing" and a "dispositional hearing"; and 5) the full utilization of due process requirements in the adjudicatory hearing.[114] These suggestions represent the realization that an adjudication of delinquency is a stigma that should only be utilized as a last resort. Many children now mustered through the judical process can best be dealt with informally, through social agencies, and out of court. Statistics defy the old theory that the court is a gateway to rehabilitation. At the same time, not all juveniles can be effectively treated without institutionalization. Those children will be filtered into the court system, where the community interest in public security must be balanced with the rehabilitative goal. This does not mean a complete divorce of such ends. The most practical method of achieving a recognition of all these interests is by an adjudicatory hearing, where the defendant receives the full protections of procedural due process. If the youth is found delinquent, a second hearing is necessitated. Here the questions involving the best interests of the child can be decided less formally, but within objective guidelines.

Subject matter jurisdiction of the Kentucky juvenile courts is far too broad. Disobedience to the parent is best handled through social agencies not involving the stigma of criminality. The same is true of the courts' dependency jurisdiction. Social agencies are better equipped to deal with the non-willful failure of parents to care for children. Neglect falls into another category. Because it involves the "right" to custody and not financial inability, the President's Commission specifically recommends it be retained. Not all authorities agree that narrowing the court's jurisdiction is sound. The 1968 version of the proposed Uniform Juvenile Court Act simply restructured definitions in an apparent effort to avoid the stigma of delinquency. Dependent children are to be called "deprived children" and disobediency jurisdiction is retained under the label "unruly children."[115] The Uniform Act approach appears to be only a superficial one—more of a compromise to obtain acceptance than a real effort at meeting the challenge.

"Intake" in the juvenile court context is a process of screening to determine what individuals referred to the court should be processed.

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[114] REPORT OF THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 55-88 (1967) [hereinafter cited as THE CHALLENGE OF CRIME].

[115] Arther, *The Uniform Juvenile Court Act*, 19 JUV. CT. JUDGES J. 153 (1969).

It exists by statue in 42 states, including Kentucky.[116] If such a process were limited to a determination of proper jurisdiction, if any, or whether available proof justifies a hearing, then it could be appropriately defended on the grounds of practical necessity. But as it presently exists, probation officers, policemen, and prosecutors can together declare informal probation without the necessary participation of parents or attorneys. After the preliminary investigation, Chapter 208 specifies, "Thereupon the court may make such informal adjustment as is practicable without a petition . . . ."[117] This arbitrary decision-making process has been soundly criticized for the lack of objective written criteria essential to maintain even a semblance of consistency.[118] But in spite of its weaknesses, the intake system has the potential to avoid the processing of children when not essential to the maintenance of public order. To safeguard the procedure, the President's Commission suggests extensive use of preliminary conferences. In this semi-formal setting the judge, the complaining witness, the youth, the parents, and the lawyer can make fullest use of informal disposition, and at the same time negotiations would be in the open and more conducive to respect. Written consent decrees should be available to explicitly state the terms and conditions of probation or other disposition. As a last resort, a petition could be filed invoking a juvenile court hearing. For those individuals loosely categorized as repeaters, institutionalization would be a significant possibility. A full adjudcatory hearing with all the rudiments of due process should be provided. The hopes of *parens patriae* theorists might still be salvaged by a separate dispositional hearing to consider the best interest of the child and the community. Here at least, an informal hearing is at once feasible and preferable. The best available scientific knowledge can be introduced in a setting functionally appropriate. Hopefully the child will have fewer premonitions about being railroaded through an arbitrary system.

The Kentucky Crime Commission has, to a large extent, adopted the theory, if not all the recommendations, of the President's Commission. Most significantly the President's Commission sought the establishment of Youth Service Bureaus. These local facilities would normally take referrals from police, the court, schools, and parents on a voluntary basis. It would provide a broad range of neighborhood services to both delinquent and non-delinquent youth. The less serious

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[116] For a complete listing see Ferster, Courtless & Snethen, *Separating Official And Unofficial Delinquents: Juvenile Court Intake*, 55 IOWA L. REV. 866 n.9 (1970).

[117] KRS § 208.070 (1963).

[118] THE CHALLENGE OF CRIME, *supra* note 114, at 86-88.

cases screened out of the juvenile court system could be particularly served by such agencies. The 1969 annual report of the Kentucky Crime Commission states:

> Although the greatest hope of delinquency prevention lies in comprehensive and effective local action, few communities are developing preventive programs, and there is too little coordination of the public agencies on the local level and of these agencies with private agencies and volunteer programs.
>
> Goal: The establishment of *youth service bureaus* which would mobilize all the resources of the community and coordinate existing agencies to:
>
> 1) Find means of ameliorating the social and psychological problems of children (and their families) before these problems cause asocial personalities and deviant behavior, and;
>
> 2) *Divert from the juvenile justice system those youths, who are in greater need of social services than court processing,* and *see to it that those youths receive those services.*[119]

The 1970 Kentucky Crime Commission report indicated a continuation of that project. In 1969 four local bureaus were funded along with a central office coordinator in the Department.[120] Such services will undoubtedly cost a great deal of money and take years to establish. Though some consider it a diversion,[121] it is a commendable effort to provide for the future as well as the present.

The recommendations of the President's Commission appear extensive, yet they do operate *without fundamental changes* in the court system. Many foreign countries have been less reluctant to alter form to fit function. The 1964 *Kilbrandon Report* in Scotland recommended abolition of juvenile courts altogether.[122] Upon apprehension the child would be taken to a newly constituted social agency. He would be asked if he committed the suspected acts. In cases of denial, the child would be sent to the regular sheriff's court for trial. If found guilty, he would be returned to the social agency for disposition, with this agency possessing the sole responsibility to determine subsequent supervision and treatment. Practically speaking, the goals outlined in Kilbrandon are similar to those of the President's Commission. A more radical approach is proposed in the British whitepaper entitled *The*

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[119] 1969 KY. CRIME COMM., *supra* note 38, at A-10 [emphasis added].

[120] 1970 KY. CRIME COMM., *supra* note 40, at 224-25.

[121] A searching criticism of "Youth Service Bureaus" can be found in Rubin & Smith, *The Future of the Juvenile Court: Implications For Correctional Manpower and Training,* 19 JUV. CT. JUDGES J. 98 (1968).

[122] *See Commentary Upon & Excerpts From Kilbrandon Committee Report, Children and Young Persons,* in CASES AND MATERIALS RELATING TO JUVENILE COURTS, *supra* note 107, at 436.

*Child, The Family and The Youth Offender.*[123] All children under sixteen would be eliminated from the jurisdictions of courts. They would be referred to local community councils of social workers and experienced laymen. Only when the facts were disputed would the case be transferred to the courts. The extensive use of lay penals in England and many of the Scandinavian countries serve much the same function as the President's Commission envisions for the preliminary conference. They are effective screening processes for the juvenile courts. But further, they usually possess the power to deal with disobediency, truancy, and dependency without the adjudication of a court.[124]

Were the General Assembly to revise Chapter 208 along the lines indicated, there would still be one glaring defect in the structure of juvenile court itself. Even eliminating the perennial problems of money and facilities, the court would be operating under a fundamental misconception that prevents optimum success. The defect is most succinctly phrased in this statement by Dean Pound:

> It has been pointed out more than once of late that a juvenile court passing on delinquent children; a court of divorce jurisdiction entertaining a suit for divorce, alimony, and custody of children; a court of common-law jurisdiction entertaining an action for necessaries furnished to an abandoned wife by a grocer; and a criminal court or domestic relations court in prosecutions for desertion of a wife and child—that all of these courts might be dealing piecemeal at the same time with the difficulties of the same family.[125]

Family court proposals are not new. For over fifty years legal commentators and authorities in many fields have urged their legislators to deal with the problems of a declining institution, the family. Only recently have such courts been organized state-wide in Hawaii, Rhode Island, New York, and Pennsylvania.[126] It is apparent that the quest for effective modes of preventing delinquent behavior will eventually lead to the realization that the whole family problem needs attention. Removal of the juvenile courts in Kentucky to the circuit

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[123] *See* GREAT BRITAN HOME OFFICE, THE CHILD, THE FAMILY, AND THE YOUNG OFFENDER, *id.* at 440.

[124] For a proposal to reduce the workload of juvenile court by the creation of local councils in the United States, *see* Elson & Rosenheim, *Justice for the Child at the Grass Roots,* 51 A.B.A.J. 341 (1965).

[125] Williams & MacFaden, *Why A Family Court?,* 20 JUV. CT. JUDGES J. 96 (1969).

[126] *See* Dyson & Dyson, *Family Courts in the United States,* 8 J. FAMILY L. 507, 519 (1968). The Pennsylvania legislation is recent. It is possible that only the Pittsburgh Family Court is in operation. *See* note 122 *supra.* It is also possible that North Carolina has an equivalent system. *See* N.C. GEN. STAT. §§ 7A-244, 7A-277 (Supp. 1967).

court level might well improve the quality of trials, since it is suggested less serious cases never reach court.[127] But even a juvenile court dealing with only serious cases must barely skim the surface of widespread family disorder. Once a child has been adjudicated delinquent, the disposition of all illegal family conduct should be unified. The General Assembly in considering revision of Chapter 208 should give serious thought to the development of a statewide family court system. A serious effort at reform of the juvenile justice system is absolutely necessary to stem the rising tide of juvenile delinquency.

*Jack M. Smith, Jr.*

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[127] 1969 KY. CRIME COMM., *supra* note 38, at A-10.